

The State of Bihar & Others

v.

Arbind

(Supreme Court Of India)

HON'BLE MR. JUSTICE ANIL R. DAVE HON'BLE MR. JUSTICE DIPAK MISRA

Civil Appeal No. 6265 Of 2013 | 26-07-2013

1. Leave granted.

2. Pregnability of order dated 21.1.2011 passed by the High Court of Judicature at Patna in L.P.A. No. 477 of 2009 whereby the Division Bench has overturned the order dated 26.2.2009 passed by the learned Single Judge in CWJC No. 5210 of 2002 and directed the respondents therein to pay 50% of the arrears of salary and the subsistence allowance in full within a period of two months and to commence the departmental proceeding afresh after issuing notice to the employee has been called in question by the State of Bihar and its functionaries in the present appeal by special leave.

3. Filtering the unnecessary details, the facts which are essential to be stated are that the respondent was appointed as a Headmaster (Education Service) by Memorandum No. 527 dated 27.9.1991 and he joined in the Government Basic School, Bakulahar on 1.10.1991. While he was functioning as the Headmaster, the District Superintendent of Education, Bettiah made a complaint to the Regional Deputy Director (Education), Muzaffarpur regarding illegal payment of salary by the respondent to the non-existing teachers. A communication was sent by the Regional Deputy Director on 18.9.1996 to the Director, Primary Education, Patna, Bihar for needful action as the respondent had illegally withdrawn Rs.35 lakhs from the treasury by manipulating the attendance register and furnishing false information. The competent authority on 10.10.1996 directed for initiation of a departmental enquiry and lodging of an FIR against the delinquent employee. Thereafter, as the facts would undrape, an FIR was lodged which gave rise to GPS No. 50 of 1996 under Sections 409 and 420, I.P.C. The respondent was put under suspension by order dated 26.5.1997 and a departmental proceeding was initiated against him on certain charges. While putting the respondent under suspension, his headquarters was fixed at the office of the District Education Officer, West Champaran. The respondent stayed at the headquarters till 3.10.1997 and subsequently left the place as he was not in a position to remain there due to paucity of money, for his salary was not paid for one year and further no subsistence allowance was paid. He submitted number of representations to release the subsistence allowance, but the authorities maintained sphinx-like silence. In the meantime, the criminal case continued and he was acquitted by the learned trial magistrate vide judgment dated 18.4.2000. As the respondent did not participate in the departmental proceedings it continued ex parte and eventually on the basis of the enquiry report, the disciplinary authority passed an order of dismissal on 30.9.2000.

4. Being dissatisfied with the order of dismissal, the appellant invoked the extra-ordinary jurisdiction of the High Court by preferring a writ petition being CWJC No. 5210 of 2002. It was not stated in the

petition that he had already preferred a departmental appeal. The learned Single Judge took exception to the same and also did not accept the other contentions raised by the writ petitioner and dismissed the writ petition.

5. Aggrieved by the order passed by the learned Single Judge, the respondent preferred an intra-Court appeal before the Division Bench. It was contended that as he had been acquitted in the criminal case, the disciplinary authority would have been well-advised to drop the departmental proceeding and not proceed further since the charges in the criminal trial and the departmental proceeding were similar; and that the departmental proceeding was vitiated as the principles of natural justice had been flagrantly violated because he was not in a position to participate in the enquiry due to his penurious condition. Emphasis was laid on the factum of non-payment of salary for one year which was payable to him and further non-release of the subsistence allowance. The said submissions were strenuously opposed by the State on the ground that the charges were not similar and, therefore, the continuance of the enquiry and the consequent order of dismissal could not be found fault with. That apart, it was urged that the subsistence allowance was not paid to the delinquent employee as he chose not to remain at the headquarters despite such a stipulation being incorporated in the order of suspension.

6. The Division Bench did not accept the first submission but found substance in the second one and accordingly set aside the order of punishment and directed the authorities to pay 50% arrears of salary and the subsistence allowance in full within a period of two months. It granted liberty to the department to proceed afresh against the employee and complete the same within a period of six months from the date of payment of subsistence allowance. The said order is the subject-matter of assail in this appeal.

7. We have heard Mr. Manish Kumar, learned counsel for the State and Mr. Atul Chitley, learned senior counsel for the respondent.

8. From the adumbration of facts, it is clear as crystal that the subsistence allowance was not paid to the respondent on the ground that he had not remained at the headquarters. The High Court has returned a finding that he had intimated the authorities expressing his inability to stay there because of his impecuniosity and despite submission of number of representations by the employee in this regard no steps were taken to disburse the said allowance. That is the bedrock of reasoning of the order passed by the Division Bench.

9. At this juncture, it is appropriate to recapitulate the principles laid down by this Court pertaining to payment of subsistence allowance and the effect of such non-payment. It is settled in law that an order of suspension never puts an end to the service of an employee. He is only not entitled to the salary but is eligible to get the subsistence allowance. It has been held in *Khem Chand v. Union of India and others* (AIR 1963 SC 687) that the effect of an order of suspension is that though the employee continues to be a member of the service he is not permitted to work and is paid only

subsistence allowance which is less than his salary. The said principle has been reiterated in *The State of Madhya Pradesh v. The State of Maharashtra and others* (AIR 1977 SC 1466).

10. It is apt to note that the subsistence allowance is governed by the service rules. It is given to a suspended employee for his sustenance. It is in a way making a provision for maintenance and survival. In *O.P. Gupta v. Union of India and others* (AIR 1987 SC 2257) it has been stated that the very expression "subsistence allowance" has an undeniable penal significance. It basically means - a means of supporting life, especially a minimum livelihood. Thereafter, the learned Judges proceeded to observe thus:-

"It is a clear principle of natural justice that the delinquent officer when placed under suspension is entitled to represent that the departmental proceedings should be concluded with reasonable diligence and within a reasonable period of time. If such a principle were not to be recognized, it would imply that the Executive is being vested with a totally arbitrary and unfettered power of placing its officers under disability and distress for an indefinite duration."

11. In *Fakirbhai Fulabhai Solanki v. Presiding Officer and another* (AIR 1986 SC 1168), while dealing with a denial of subsistence allowance during a proceeding before an Industrial Tribunal, the Court expressed that if no amount is paid during the pendency of such an application it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal and such denial leads to violation of principles of natural justice and consequently vitiates the proceedings before the Tribunal under sub-section (3) of Section 33 of the Act and any decision given in those proceedings against the workman concerned.

12. In *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and another* (AIR 1999 SC 1416), the Court expressed the view that when on account of penury occasioned by non-payment of subsistence allowance an employee is not able to undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer on such proceedings which are held *ex parte* stand vitiated.

13. In *Jagdamba Prasad Shukla v. State of U. P. and others* (AIR 2000 SC 2806) it has been ruled that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right and if a suspended employee is unable to appear for want of funds on account of non-payment of subsistence allowance, it is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to defend himself in the departmental enquiry and that vitiates the departmental enquiry and the consequent order of removal from service. It is seemly to state here that in the said case the employee had intimated the authorities about the financial crunch.

14. In this context, we may fruitfully refer to a two-Judge Bench decision in *Anwarun Nisha Khatoon v. State of Bihar and others* (2002) 6 SCC 703). In the said case the employee claimed for subsistence

allowance for the entire period of suspension of her husband, who was not terminated, and during the pendency of the enquiry had breathed his last. The wife preferred a writ petition before the High Court of Patna which was dismissed on the ground that the husband of the appellant therein was only present for one day at the headquarters and hence, not entitled to the benefit. Before this Court, it was argued that under Rule 96(2) of the Bihar Service Code a Government servant is required to furnish a certificate that he is not engaged in any other employment, business, profession or vocation and as such a certificate was never submitted, the subsistence allowance was not paid. Reliance was placed upon the authority of the High Court in the case of Ganesh Ram v. State of Bihar (1995) 2 Pat LJR 690 wherein the High Court had opined that it was not necessary for an employee to attend the work after suspension. It was also stated therein that the suspended employee could not be compelled to mark attendance. Further it was ruled that the authority was entitled to ensure itself about the presence of suspended employee at the headquarters before making payment of subsistence allowance and in the event of a dispute it would be the employee to establish his presence at the headquarters. This Court, commenting on the said decision, ruled thus:

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"In our view, this authority, far from assisting the respondents, is against them. This authority shows that there is no requirement to mark attendance. To us also no rule could be shown which required a suspended employee to mark attendance. The respondents can at the most ask for a certificate that the appellant's husband was not engaged in any other employment, business, profession or vocation. The appellant's husband having died, he could not have furnished such a certificate. At no stage have the respondents asked the appellant to give such a certificate. Thus the grant of subsistence allowance cannot be denied on the ground that such a certificate is not given."

After so holding, the Court directed that after the employee filed an affidavit that her husband was not engaged in any other employment, business, profession or vocation, the subsistence allowance would be released in her favour.

15. From the aforesaid authority it is clear as day that the presence at the headquarters was not a requirement under the Rule. In the case at hand, there is no rule that provides that the suspended employee should remain at the headquarters to be entitled to get subsistence allowance. That apart, as is evident, the respondent herein had clearly stated about his financial condition and his inability to remain at the headquarters. It is not the case of the functionaries of the State that he was asked to furnish a certificate and he did not furnish. The whole case rests on the fact that as the respondent- employee did not remain at the headquarters no subsistence allowance was paid.

16. At this juncture, we may note two authorities which relate to the effect of non-payment of subsistence allowance. In *Indra Bhanu Gaur v. Committee, Management of M.M. Degree College and others* (2004) 1 SCC 281, it has been ruled that unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be

held as an absolute proposition in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates the departmental proceedings. (2005) 8 SCC 211)

17. In *U.P. State Textile Corpn. Ltd. v. P.C. Chaturvedi and others*, the two-Judge Bench relying on the pronouncement in *Indra Bhanu Gaur (supra)*, has ruled thus: -

"So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken by Respondent 1 employee that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. He did not plead or substantiate also that the non-payment was either deliberate or to spite him. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as an absolute position in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings."

18. We have noted the aforesaid authorities as doctrine of prejudice has been associated with non-payment of subsistence allowance. We need not dwell on the concept of absolute position in law. We are only inclined to state that it would depend upon the stipulations made in the rules and the facts of the case. We may hasten to clarify that rules made by the Competent Authority are always subject to their constitutional validity. As far as the present case is concerned the facts do clearly reveal that the salary that was due to the respondent was not paid for unfathomable reason. The subsistence allowance was not paid on the singular ground that he had not stayed at the headquarters despite a stipulation in the order of suspension. The respondent had submitted number of representations with regard to his penurious condition to stay at the headquarters and participate in the disciplinary proceedings. There is nothing in the Rules which would require for a suspended employee to remain at the headquarters. Thus, in the present case, even if the doctrine of prejudice is applied, it is quite obvious that the respondent herein was absolutely handicapped to participate in the departmental proceedings and hence, prejudice was caused. In this backdrop, we do not find any error in the conclusion arrived at by the High Court as far as the quashing of order of punishment is concerned. As far as the directions issued by the High Court are concerned, the learned counsel for the State has submitted that the full salary from the period 1.1.1996 till the date of suspension, i.e., 26.6.1997 has not been paid and hence, the direction by the High Court to pay the same cannot be found fault with. As far as subsistence allowance is concerned from 25.6.1997 till 13.9.2000, the same has to be paid at the rate of 50% of the salary. Mr. Chitale, learned counsel for the respondent has stated that he would restrict his claim for subsistence allowance from 13.9.2000 till the date of order passed by the High Court to Rs.1,00,000/- (rupees one lac only). The aforesaid amount shall be computed and be paid to the respondent within a period of six weeks. We may hasten to clarify that the period after the order of the High Court shall be treated as period under suspension till the termination of the disciplinary proceeding and the subsistence allowance shall be paid in accordance with rules. The enquiry shall commence after the amount is released and the same shall be concluded within three months therefrom.

19. With the aforesaid modifications in the order of the High Court, the appeal is disposed of with no order as to costs